No. 263.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1902.

MUTUAL RESERVE FUND LIFE ASSOCIATION, . . . *Appellant*,

VERSUS

JAMES S. PHELPS AND THE FIDELITY TRUST & SAFETY VAULT CO., ... *Appellees*.

Brief of Appellees on Appeal from the United States Circuit Court of Appeals, Sixth Circuit.

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JOHN P. MORTON & COMPANY, PRINTERS, LOUISVILLE.

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Statement of the Case.

The opinion of the Circuit Court of Appeals, Sixth Circuit, Judge Lurton writing, contains a complete statement of the facts of this case, as well as an exhaustive review of the law. (Record and 112 Fed. Rep., p. 453.)

The salient features of this appeal will be found to be as follows:

On February 28, 1900, the appellant, James S. Phelps, filed a petition in the Jefferson Circuit Court, a court of general jurisdiction established and existing as one of the several circuit courts of the State of Kentucky. In said petition the appellant here, The Mutual Reserve Fund Life Association, was made defendant. The petition and its prayer sought to recover from the defendant $1,994.20, with interest, which amount was alleged to be the aggregate of certain assessments, dues, and premiums which the defendant had received from the plaintiff during his membership in the Association. Plaintiff's cause of action was based upon cer-

tain alleged arbitrary and illegal acts of the defendant Association, in changing the character of its business and substituting for the assessment plan of insurance the methods and figures in use by old line, straight life companies. These acts, it was alleged, were without the plaintiff's knowledge or consent, and served to deprive him of the guaranteed rights which, as a member of the Association, were secured to him by the policy contract, charter, and by-laws of the Company. The petition set forth an unjust and unauthorized revocation by the Association of the plaintiff's contract of insurance, which entitled plaintiff to a return of the money which he had theretofore paid for the contract and the insurance incident thereto. (Record, page 10.) People's Insurance Fund v. Bricken, 92 Ky. 297.

Upon this petition there issued two summonses, one on February 28, 1900, the other on March 1, 1900. The first summons was duly returned on March 1, 1900, by the Sheriff of Franklin County, Kentucky, executed by service thereof upon W. H. Stone, Insurance Commissioner of the State of Kentucky. The second summons was duly returned on March 1, 1900, by W. L. Doolan, special bailiff, executed by service thereof on Ben. Frese, who, as alleged in the officer's return, was, at the time, managing agent of the Mutual Reserve Fund Life Association in Jefferson County, Kentucky. (Record 17.)

On April 14, 1900, after service of process, as above stated, the defendant Company through its local counsel entered its special appearance for the purpose of moving to quash the return both of the Franklin County Sheriff and the Jefferson County Special Bailiff. A motion of the character mentioned was, on April 14, 1900, made before the Jefferson Circuit Court by the defendant Association, and objected to

by the plaintiff. The issues thus formed involved the power and authority of W. H. Stone, Insurance Commissioner of Kentucky, to receive service of process for the Mutual Reserve Fund Life Association, and the agency of Ben. Frese, his relations to the Association, and his right and authority to receive service of process for said Association. The facts as developed at the hearing showed that, pursuant to the requirements of the Kentucky Statutes, the Mutual Reserve Fund Life Association had by resolution of its Board of Directors consented that service of process upon the Commissioner of Insurance of Kentucky in any action brought or pending in the State should be a valid service upon the Association. On October 10, 1899, after an examination of the affairs of the Mutual Reserve, the Insurance Commissioner of Kentucky revoked all authority granted by his department to the Association, which, immediately upon the promulgation of such order of revocation, withdrew from the State its working force but continued all its then existing business in the State and collected a large revenue thereon. Respecting Ben. Frese, the proof of the plaintiff caused it to appear that said Frese had represented himself as the local treasurer of the Mutual Reserve Fund Life Association in Louisville, and had time and again received moneys owing to the Association, and had executed and delivered to persons meeting obligations to the company, receipts signed by the Treasurer of the Mutual Reserve and countersigned by the said Frese as local treasurer. The defendant's proof admitted the testimony of the witnesses for the plaintiff, touching the acts of the said Frese, but by affidavit of its Secretary the Association attempted to show that the Western Bank, and not Ben. Frese, its cashier, was the authorized local treasurer in Louisville.

After proof introduced by both parties and arguments made by their respective counsel, the Jefferson Circuit Court decided, as findings of law and fact, first, that service of process on the Insurance Commissioner was sufficient to bring the defendant before the court, his power to receive service not being prejudiced by the department's revocation spoken of before. Second, that Ben. Frese was at the time of service of summons upon him the local treasurer of the Mutual Reserve Fund Life Association, and as such officer and agent might be served with summons, and the defendant association thereby brought before the court. (Record, p. 21.)

After the decision by the court on the sufficiency of the service of process, the defendant made no further defense, filed no demurrer, answer, or other pleading, and after the regular statutory time had passed the case was duly docketed, and judgment by default for the amount asked in the petition was rendered against the defendant. Upon said judgment, an execution of *fieri facias* was duly issued on May 21, 1900, and returned on June 12, 1900, by the Sheriff of Jefferson County, Kentucky, "no property found." Thereafter, on August 4, 1900, the plaintiff filed in the action theretofore instituted, as set forth above, an amended and supplemental petition stating the steps and proceedings which had theretofore been taken by the court, reciting the rendition of the judgment, the issuance of the execution, and the return thereof by the sheriff. Said amended and supplemental petition further set forth as facts that the defendant Association had been conducting an insurance business in Kentucky for more than fifteen years, that its authority to longer canvass for business had been revoked by the Insurance Commissioner of the State, that the Association

had withdrawn from the State all of its agents and employes who had previously been engaged in the transaction of its business, that the Association was by various schemes and subterfuges attempting to take out of the State its property and assets for the purpose of defrauding creditors resident in the State, that the Association had continued in force its old policy contracts with Kentucky members, and was receiving thereon large sums annually. The amended and supplemental petition, therefore, prayed an attachment against or garnishment of these persisting policy-holders of the Association, or if the court thought best, that a receiver be appointed to take charge of the property owned and held by the defendant in Kentucky, and out of the revenues, income, and profits of the estate so impounded, the satisfaction of plaintiff's judgment might be had. (Record, p. 23.) Upon the filing of this verified amended and supplemental petition (which may also be taken and considered as an affidavit), the Jefferson Circuit Court, on August 4, 1900, made and had entered an order appointing the Fidelity Trust and Safety Vault Company, of Louisville, receiver, in accordance with the prayer of the pleading. In said order the court directed the receiver to take possession of all the assets and estate of the Mutual Reserve Fund Life Association in Kentucky, to collect and receive all moneys, premiums, assets, debts, things in action, and credits then owing or thereafter to accrue to the said defendant Association in Kentucky, and to take and hold the same for the further administration by the court of the said property and income to the end that the judgment of May 19, 1900, might be satisfied. The receiver was authorized to prosecute and defend all such suits at law and in equity as might become necessary in the discharge of its duties, and all policy-holders of defendant

were warned and directed to pay to the said receiver all dues, premiums, and assessments as the same might accrue and become due from them to the company. The order of appointment further provided an injunction against any interference of the receiver in its management, custody, and control of the property sequestered. A bond in the sum of three thousand ($3,000) dollars was required of the receiver, which on August 4, 1900, it executed with its capital stock as security. The bond being approved by the court, the receiver entered at once upon the duties of the trust. (Record, p. 22.)

Thereafter, on August 22, 1900, the defendant Association tendered to the State Court its petition and bond for removal of the cause then pending to the United States Circuit Court. The application coming too late, filing of the pleadings was denied and the parties permitted to proceed. (Record, p. 27.)

The Fidelity Trust & Safety Vault Company, named as Receiver and qualified as such, entered upon the execution of the business committed to its care and custody, took possession of the assets of the Association, which consisted of income-earning contracts, notified the policy-holders of conditions and prepared to carry on the concern. At this point, on August 23, 1900, the Mutual Reserve Fund Life Association, defendant in the State Court as stated, filed its bill in equity in the United States Circuit Court for the Sixth Circuit and District of Kentucky, setting forth among other things the proceedings had in the Jefferson Circuit Court, and prayed the said United States Circuit for a writ of injunction against the said Receiver to restrain it from obeying the mandate of the State Court, and to restrain it from continuing possession of or in any way attempting to control the

assets of the complainant Association in Kentucky. The bill in the United States Circuit Court was based upon the alleged invalidity of the judgment rendered by the State Court on May 19, 1900. The judgment was attacked as void as having been rendered without jurisdiction on the part of the State Court to hear and determine the action, it being set forth in the complainant's bill that the summonses served upon the Insurance Commissioner and Ben. Frese were both ineffective in bringing the defendant Association before the court. The judgment being represented as a nullity, the subsequent proceedings in aid of such judgment were challenged as illegal and prejudicial to complainant's rights. (Record, p. 1.) A copy of the State Court record was filed as an exhibit with the bill.

On August 25, 1900, the two defendants to the Association's bill in the United States Circuit Court, James S. Phelps and the Fidelity Trust & Safety Vault Company, Receiver, entered their joint and separate appearance for the purpose of filing a demurrer and plea to the jurisdiction of the Federal Court, and such demurrer and plea were duly made and entered. In support of the said demurrer and plea it was alleged and contended: first, that there was a want of equity in the bill; second, that the United States Circuit Court was without jurisdiction in the cause, because the amount involved in the controversy was but Nineteen Hundred and Ninety-four Dollars and Twenty Cents, with interest; third, that the United States Circuit Court was without jurisdiction by reason of the prohibition of Section 720 of the Revised Statutes of the United States, denying to the courts of the United States the right and authority to grant a writ of injunction to stay proceedings in any court of a State. (Record, p. 42.) On the same day the United States Circuit Court overruled

said demurrer and plea, and entered an order enjoining the defendants, James S. Phelps and the Fidelity Trust & Safety Vault Company, Receiver, from further carrying out the order of the State Court, and from taking any additional step in the execution of the trust imposed upon the Receiver, and further restraining said parties from seeking in any way to subject to the payment of the judgment of the State Court any of the revenue or the income of the complainant Association derived from dues, assessments, mortuary calls, or premiums that had accrued or might thereafter accrue to the Association from any of its certificate-holders or members. (Record, p. 9.)

On February 2, 1901, the defendants, Phelps and the Fidelity Trust & Safety Vault Company, again appeared in the United States Circuit Court and moved the dissolution of the injunction theretofore issued, upon the same grounds as relied upon in their demurrer and plea to the jurisdiction of the court. Such motion to dissolve was immediately overruled by the Circuit Court, whereupon the defendants filed their petition for appeal, together with an assignment of errors, and the case taken to the United States Circuit Court of Appeals, where it was heard by Circuit Judges Lurton, Day, and Severens. On December 3, 1901, the Circuit Court of Appeals reversed the lower court and remanded the cause with directions to dismiss the ~~appeal~~ bill for want of equity and to dissolve the injunction. From that decision of the Court of Appeals, an appeal has been prosecuted to this court, and the case is here for final determination.

Argument.

The appellees desire to present and discuss the following points:

1. The judgment of the State Court rendered on May 19, 1900, was a valid judgment, being based upon jurisdiction in the court, both of the subject-matter of the suit and all parties thereto.

2. The appointment of the Receiver, made by the State Court on August 4, 1900, was a valid appointment, the procedure adopted being legally sufficient.

3. The motion to remove the cause from the State Court to the United States Circuit Court was properly overruled. The motion as affecting the original petition came too late. The ancillary proceedings by supplemental petition were not removable. In either case the amount in controversy was but $1,994.20 with interest.

4. The property and income impounded by the Receivership was not a trust fund, exempt from process on the judgment of Phelps.

The State Court was, after all, the proper tribunal to decide any question of trust and exemption.

5. No multiplicity of suits threatened the defendant Association in the State Court. If any further litigation was impending, the policy-holders, and not the Association, were concerned. No policy-holder is a party to this cause.

6. The State Court possessed jurisdiction in the case both by actual service of summons on the defendant and by a seizure of the res in controversy.

The Receivership was only a proceeding in aid and execution of the judgment previously secured and then and now unsatisfied.

By the Receivership all assets of the Association were impounded by the State Court.

7. The U. S. Circuit Court was without power or authority to enjoin. Section 720 of the Revised Statutes of the U. S., the comity in vogue among courts of concurrent jurisdiction, the necessities of the case, all deny to the court below power to issue the injunction.

8. The State Court practice offered the appellant Association adequate and effectual remedy for the wrong complained of in its bill before the U. S. Circuit Court.

The procedure adopted is without precedent as it was without justification.

The Validity of the Judgment Rendered by the State Court.

The jurisdiction of the Jefferson Circuit Court, a court of general equity and common law powers, to render the judgment against the Mutual Reserve Fund Life Association was secured by two summonses, properly issued against and regularly served upon the Association. One of the two summonses mentioned was executed upon the Insurance Commissioner of Kentucky, a designated agent for service of process, and the other upon Ben. Frese, the local treasurer of the Association in the State.

(*a.*)

The Company in 1893, by resolution of its directory, had nominated the Insurance Commissioner as an agent upon whom service of process might be had. (Record, p. 34.) The statute law of Kentucky compelled such action on the part of the corporation. (See Appendix.) As long as the Association continued to do business in Kentucky, the authority vested by it in the Commissioner existed. This proposition requires little argument. Any other construction of the statute makes it a trap to catch Kentucky citizens rather than a protection to them from the fraud and false practices of foreign corporations—a result certainly not intended by the Legislature.

At the time of service of process on the Insurance Commissioner, the defendant Association had in force in Kentucky over 1,000 policy contracts, by virtue of which premiums aggregating largely more than $50,000 per annum accrued to and were collected by it. (Record, p. 2.) The mere fact that in October preceding the date of service, the

insurance department of the State had revoked the Association's license to longer canvass for new applications, did not cause the company to cease doing business in Kentucky. This is the ruling of this court in Conn. Mutual Life Insurance Company v. Spratley, 172 U. S. 602, a case syllabized as follows:

"A foreign insurance company which has been doing business within a State through its agents does not cease to do business therein when it withdraws its agent and ceases to obtain or ask for new risks or obtain new policies, while, at the same time, its old policies continue in force."

Swann v. The Mutual Reserve Fund Life Association, 100 Fed. Rep. 922, decided by Judge Evans and remarked upon by him in his opinion in this case, seems founded upon reasoning and establishes a rule hostile to the announcement of the Spratley case, *supra*.

Kerr on Insurance, Section 26, gives this announcement of the law:

"A life insurance company which is merely collecting premiums and paying losses on old policies is still 'doing business' within the meaning of the statute regulating foreign corporations and within the meaning of tax laws."

The Kentucky Court of Appeals, considering the statute of its own State, holds a foreign insurance company to be in court when served with summons as the appellee here was served by process executed on the Commissioner. Home Benefit Society v. Muehl, 22 Ky. Law Rep. 1378; 60 S. W. Rep. 371; Germania Insurance Co. v. Ashby, 23 Ky. Law Rep. 1564.

These decisions of the Kentucky Court of Appeals are controlling upon all other courts, both State and Federal. The controversy between the appellant and appellees to this

appeal, relative to the validity of the judgment rendered by the Jefferson Circuit Court, rests in part upon the construction to be placed on Section 631 of the Kentucky Statutes. The appellant contends that the section referred to continues the authority of the Insurance Commissioner to receive service of process for the Association only so long as it canvassed for and accepted new business within the State. The appellees maintain that Section 631 contemplated authority in the Insurance Commissioner during all times that the Association may possess policy contracts in Kentucky upon which it receives premiums and under which a liability exists. The statute in question has been construed by the court of last resort in Kentucky according to the contention of appellees, and such construction will be adopted by the courts of other jurisdictions. This court has frequently held that "it is the peculiar province and privilege of the State courts to construe their own statutes; and it is no part of the functions of the Supreme Court of the United States to review their decision, or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts." Commercial Bank v. Buckingham, 5 How. 317; Lawler v. Walker, 14 How. 149; Central Line Company v. Laidley, 159 U. S. 103.

(*b.*)

The second summons, issued on the petition filed in the State Court, was executed on Ben. Frese, judicially ascertained by the State Court to have been at the time of service the local treasurer of the defendant Association, and an officer who might properly be served with process. Evidence adduced showed that Ben. Frese had represented himself as local treasurer, had received dues, assessments, and

debts due the Mutual Reserve Fund Life Association, and had furnished and countersigned receipts signed by Geo. W. Harper, the Treasurer of the Association in New York. (Record, p. 20.) The Association's letter, appointing a local treasurer in Louisville, is addressed to Ben. Frese, and is filled with directions to him. (Record, page 36.)

The appellant lays much stress on the circumstance that the pleading of Phelps in the State Court states that "after December, 1899, the defendant revoked the authority of such collectors and treasurers." It is insisted that this statement makes it conclusive that no local treasurer existed in Kentucky on March 1, 1900, when Frese was served. As a matter of fact a local treasurer of the Association did remain in Kentucky after December, 1899, that is, until March 12, 1900, as shown by receipts filed in the record by Phelps, and as appears from the affidavit of Camp, the secretary of the Mutual Reserve Fund Life Association.

On the hearing of all questions touching the sufficiency of the service had on the Insurance Commissioner and Ben. Frese, the defendant Association was before the court, in fact, made the motion to quash, upon which the court's rulings of law and fact were made. Under such circumstances the decision of the State Court, relative to the agencies of both the Commissioner and Frese and the authority of these parties to receive service of process for the defendant, was not open to review or reversal by the United States Circuit Court. All questions raised and determined in the State Court were, as to the Federal Court, *res adjudicata*. Mock v. Insurance Company, 10 Fed. Rep. 696. If the State Court committed error in its decision it was reversible error, which upon appeal from the final judgment in the case was cognizable in the Kentucky Court of Appeals.

As said by Judge Lurton in the opinion of the Circuit Court of Appeals:

"Having appeared for the purpose of challenging the jurisdiction of the court, the decision of the court upon that issue is conclusive, until annulled or reversed by some court having jurisdiction to revise and correct error. However erroneous the conclusions of the Jefferson Circuit Court may have been, and we intimate nothing in that respect, its judgment is certainly not void, and in a proceeding of this kind we must accept it as a valid and legal judgment; for neither the circuit court nor this court have any character of appellate or revisory jurisdiction over that court."

Work, on Courts and their Jurisdiction, page 164, states the law thus:

"If there has been an attempted service, and the question is one of fact as to whether the proper service was made, or one of law whether the acts done constituted sufficient service or not, the presumption will be indulged that the court considered and determined the question, and the defect can only be taken advantage of by a direct attack. This rule has been held to apply as well to constructive as to actual notice. And the recitals in the record of a court of general jurisdiction showing that jurisdiction has been obtained by constructive service, are sufficient to uphold the judgment as against a collateral attack."

In the instant case the record of the State Court shows affirmatively that on every question involved in the sufficiency of the service of summons, the defendant Association not only had its day in court, but actually appeared, and by response tried out before the State Court all issues of law and fact.

After the Jefferson Circuit Court held its jurisdiction to have attached, the action proceeded in a regular manner to judgment, due time being afforded the defendant to plead, the case properly docketed, submitted, and considered.

Such in brief is the history of the judgment rendered on May 19, 1900.

The Validity of the Receivership as a Proceeding in Execution of the Judgment.

The judgment having been rendered, an execution of *fi. fa.* issued, was placed in the hands of the Sheriff, and returned by him "no property found." The plaintiff, Phelps, had then, as we submit, the choice of two procedures in aid of his judgment. He might have instituted a separate equitable action under Section 439 of the Kentucky Civil Code of Practice, for a discovery of any property to which the defendant was entitled, and an order subjecting such property to the satisfaction of the judgment. (See Appendix.) Or, the plaintiff could have filed in the same action in which the defendant had been summoned and the judgment secured, a supplemental petition or affidavit, and thus have obtained an attachment, a receivership, or any process by which the defendant's property might be seized and held to answer the judgment debt.

The second-named course was adopted and employed by the plaintiff before the Jefferson Circuit Court, a court which was and is one exercising both common law and equity jurisdiction. The procedure so followed is common to ancient equity practice, and has been approved by the Kentucky Court of Appeals. The case of Caldwell v. Deposit Bank of Eminence, 18 Ky. Law Rep. 156, was a suit to settle the estate of W. P. Hardin, and in that case the Bank filed an answer and counterclaim, setting up a debt to it from Hardin. The pleading was filed March 12, 1892; judgment sustaining the claim was rendered in favor of the bank on March 30, 1892. More than sixty days after the rendition of that final

judgment, and long after the term of court, the bank filed a supplemental pleading in the same action, setting up its judgment, execution, return of *nulla bona*, and prayed the court for an attachment. The court sustained the prayer of the amended petition and held that certain conveyances made by the debtor were fraudulent, ordered the deeds canceled and the property sold to satisfy the judgment. The Court of Appeals reversed the judgment of the lower court on the ground that the property was not liable, but the method of procedure adopted by the bank was never criticised. So in the case of Lewis v. The Deposit Bank of Eminence, 22 Ky. Law Rep. 684, Judge DuRelle refers to the case of Caldwell v. Bank, *supra*, and recites with approval the steps taken in that case by amended and supplemental petition more than sixty days after the rendition of the final judgment as a proceeding in aid of the court's orders.

The learned Judge of U. S. Circuit Court was of the opinion, "that from and after the rendition of the judgment of May 19, 1900, the action in the State Court was *functus officio* for all purposes of pleading, that its force was spent, and all steps attempted to be taken thereafter, except by way of writs for the execution of the judgment, were *coram non judice* and void." (Citing Brown v. Van Cleave, 86 Ky. 381; Meadows v. Goff, 90 Ky. 540.)

These authorities, when examined and understood, do not sustain the proposition announced, that the proceedings taken after the rendition of the judgment of May 19, 1900, to enforce the satisfaction of the same, are *nullities*. On the contrary, Brown v. Van Cleave clearly shows that the subsequent proceedings to enforce the satisfaction of the said judgment against the defendant, under which there had been a return on the *fi. fa.* of *nulla bona*, and which still

remained unsatisfied, were legitimate and proper. In Brown v. Van Cleave the pleading filed subsequent to the rendition of the judgment, which the court condemned as a nullity, was a proceeding not for the satisfaction of the judgment which had been rendered, but a declaration upon a new, separate, and distinct cause of action, which, in the language of Judge Bennett, who pronounced the opinion in the case, was "a distinct and new cause of action, which was in no manner germane to the issues joined in the original action between the appellant and appellee." Said Judge Bennett in that case:

"The object of the amended petition was not to subject the stock to the payment of the notes on account of appellant's liability thereon, because his liability thereon had already been determined by the court, and that liability had been discharged by the payment of the money in court, under its order, in satisfaction of the judgment; but the object of the amendment was to subject the stock to the satisfaction of the remaining portion of the notes, for which it had been adjudged the appellant was not liable. The amendment, therefore, alleged a distinct and new cause of action, which was in no manner germane to the issues joined in the original action between the appellant and appellee. In the original action the judgment against the appellant fixing his liability was complete and final. In the action by the amended proceeding a new, independent, and distinct cause of action was presented, which was prosecuted to a final judgment, from which the appellant has appealed."

Judge Bennett, speaking for the court in that case, further said:

"So, then, after a final judgment had been rendered, and after it had been discharged according to the terms prescribed by the court, the appellee filed an amended petition, in which he set up a new and distinct cause of action against the appellant. The cause of action thus set up was not designed to aid in effectuating the judgment already rendered, for that judgment had been satisfied; but it was

designed to subject the appellant's property to the payment of the remaining portion of the two notes, for the payment of which he, according to the judgment of the court, was not bound. It is thus seen that the amendment proposed a new and distinct cause of action, and for that reason alone the amended petition should have been rejected."

This is the case of Brown v. Van Cleave, upon which the learned judge of the lower court based the proposition that the amended and supplemental petition in this case, which was designed to aid in effectuating a judgment already rendered, which judgment was and still remains unsatisfied, was a nullity. Undoubtedly the court was misled by the syllabus in Brown v. Van Cleave, the second heading of which is in the following words:

"2. Proceedings upon an amended petition filed after judgment, and after the judgment had been discharged, were mere nullities."

Meadows v. Goff, 90 Ky. 540, opinion by Judge Bennett, simply reaffirms the doctrine of Brown v. Van Cleave. These authorities do not sustain Judge Evans in the statement that "the filing of the supplemental petition and the action of the court appointing a receiver thereon should be treated as nullities." When examined and properly understood, the cases referred to expressly sustain the proposition that supplementary proceedings in the court and cause wherein a judgment has been rendered, when taken in aid and in execution thereof, are not nullities, but are proper, legal, legitimate, and valid.

The rendition of the final judgment did not operate in law to take the case off the docket; on the contrary, it remained upon the docket, and the court's jurisdiction and power over it and the parties to it remained for all purposes

tending towards its enforcement and satisfaction. This law was announced by Chief Justice Marshall as far back as Wayman v. Southard, 10 Wheaton, 1:

"The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied."

See also Leathe v. Thomas, 97 Fed. Rep. 136, hereinafter quoted.

The appellant here has been able to cite no authority to support his attack on the validity of the receivership as a proceeding in execution of the judgment. Were there a total want of citation favorable to the contention of the appellee, the decision of the Jefferson Circuit Court would be held to lay down the correct rule. This court in Laing v. Rigney, 160 U. S. 542, which involved the validity of a judgment rendered on a supplemental petition filed and prosecuted without summons being issued thereon, said:

"In the absence of any statutory direction on the subject and of any reported decisions of the Supreme Court of the State we are justified in finding the law to be as declared in the case in hand."

The defendant Insurance Company had been adjudged by the court to be properly before it by legal service of process, and the judgment rendered remained unsatisfied. It was unnecessary to issue a summons against the Association on the amended and supplemental petition, because as no new cause of action was presented therein, it was charged with notice of all steps taken in the case both before and after judgment for the satisfaction thereof, in an action wherein it had its day in court. What possible reason or necessity could there have been to give the defendant notice

that a judgment against it remained unsatisfied, and that the plaintiff, by a verified application to the court setting forth that there was property in the State or choses in action due to it, would ask the court to appoint a receiver to take possession of the same for the purpose of satisfying the judgment? No injury could accrue to the judgment debtor from failing to give it notice that the plaintiff would take steps against it in the very action in which the judgment had been rendered to have the judgment satisfied.

An execution issues on a judgment, and under it property of the defendant is seized without notice being given to the party in interest except such as accrues from the seizure. In the case at bar the assets of the defendant Association in Kentucky could not be reached by execution, and upon this fact being reported to the court, together with the information that the assets were being removed from the State for the purpose of defrauding the plaintiff, the court appointed a receiver to seize the assets and hold them to the satisfaction of the judgment.

The Circuit Court of Appeals in discussing this branch of the case held:

"The power to render that judgment included the power to issue all proper process to enforce its payment. The jurisdiction of the court over the controversy and over the parties, acquired in the primary case by service of process, continued until its judgment should be satisfied. This is a well-settled rule in respect to the jurisdiction of the courts of record. (Wayman v. Southard, 10 Wheat. 1, 22, 6 L. Ed. 253; Riggs v. Johnson Co., 6 Wall. 166, 187, 197, 18 L. Ed. 768; Covell v. Heyman, 111 U. S. 176, 183, 4 Supt. Ct. 355, 28 L. Ed. 390; Railroad Co. v. Gomila, 132 U. S. 478, 483, 10 Sup. Ct. 155, 33 L. Ed. 400.)

"In the instance before us the State court had acquired jurisdiction over the association by service of process upon its duly constituted agents. An execution had been re-

turned 'No property found.' The court by a sworn petition was then advised that this non-resident judgment debtor had no property subject to execution, but that it was in receipt at stated times of dues and premiums upon existing contracts of insurance, and that it has revoked the authority of all its agents and collectors within the State, and was requiring all such accruing dues to be remitted directly to its home office by the policy-holders themselves, and that this method of conducting its business in the State had been resorted to for the purpose of removing its assets beyond the jurisdiction of the State. In this situation, the court was asked to impound and sequester these choses in action, through means of a receiver, that they might be applied to the payment of this judgment. Manifestly, the action of the court in impounding property of the judgment debtor, which could not be reached by execution, was action auxiliary to the primary suit. The proceeding was not in any sense a new suit or separate action. That which the court was asked to do, and that which the court did do, was to take a step in aid of satisfaction of its judgment; and this it did as a proceeding ancillary to the judgment, and by virtue of its previously acquired jurisdiction over the subject-matter of the controversy of the parties. Instead of ordering an *alias fi. fa.*, or an attachment, it appointed a receiver and directed him to take possession of the choses in action, which apparently constituted the only property of the debtor within the jurisdiction. This appointment was made without other than constructive notice. How, otherwise, could it be, if the averments of the supplemental petition were true? Was the court powerless because the judgment debtor was a foreign corporation, unrepresented by agents, and having no property subject to execution?"

The proceeding subsequent to the judgment was distinctively in the nature of a writ for the collection of the judgment. Speaking of receivers similar to the one here in question, Mr. Beach says: "In such a case the appointment is in the nature of an equitable attachment, whereby the court acquires the custody of the property and retains it until the final determination of the case."

The proposition is well sustained that without summons or notice, a court of equity has the power to sequester property through the medium of a receivership when the circumstances of a cause appear to demand such action. Mr. Justice Brewer so holds in Shields v. Coleman, 157 U. S. 178:

"Mr. Justice Matthews, in Heidritter v. Oil Cloth Co., observed: 'But the land might be bound without actual service of process upon the owner, in cases where the only object of the proceedings was to enforce a claim against it specifically, of a nature to bind the title. In such cases the land itself must be drawn within the jurisdiction of the court by some assertion of its control and power over it. This, we have seen, is ordinarily done by actual seizure, but may be done by the mere bringing of the suit in which the claim is sought to be enforced, which may, by law, be equivalent to a seizure, being the open and public exercise of dominion over it for the purpose of the suit.'

"Undoubtedly, the circuit court (of the State) had authority under the bill filed June 6, 1892, to make the order appointing the receiver and taking possession of the property. Even if it were conceded that the bill was imperfect and that amendments were necessary to make it a bill complete in all respects, it would not follow that the court was without jurisdiction. The purpose of the bill—the relief sought—was, among other things, the possession of the property by a receiver to be appointed by the court, and when the court adjudged the bill sufficient and made the appointment, the appointment could not be questioned by another court, or the possession of the receiver thus appointed be disturbed."

Thompson, in his Commentaries on the Law of Corporations, Section 6880, says:

"Where there is no statute requiring notice to be given it is not in all cases indispensably necessary to the validity of the appointment of a receiver that notice of the application should be given to any one. A little reflection will make this more apparent. The appointment does not change any rights of property. In many cases it is a mere interim

impounding of property for the purpose of administering it in the interest of all who have any claims against it or liens upon it. Besides cases may arise in which it may become necessary to effect a seizure of the property before notice can be given, in order to prevent it from being concealed or carried out of the jurisdiction. Moreover, it is to be remembered that a seizure and an impounding of the property in itself conveys notice to its custodian."

Cook on Corporations, treating of the subject here in hand, states the following:

"A receiver of the assets in the jurisdiction belonging to a foreign corporation is more readily appointed *ex parte*, especially where it is difficult to obtain service." Section 863, page 2017.

How much stronger is the case on review, where the receivership was but in execution of a judgment and in a cause where the defendant had been summoned and had appeared.

It has been held that where an application for a receiver is ancillary to the main purposes of a suit, the facts essential to the appointment need not be pleaded, but may be shown by affidavit.

Commercial Bank v. Corbett, 5 Sawy. 172.

The transfer of the case from the common law to the equity docket was in strict conformity to the usual, ordinary, and well-established practice and rules of the Jefferson Circuit Court where, in an action at law, it becomes necessary to take steps authorized by chancery practice. The various certificate- and policy-holders, debtors of the defendant, were not made garnishees, and, of course, Section 227 of the Civil Code does not apply to them, nor were they made parties. Any one of the certificate- or policy-holders, before they could be proceeded against by compulsory process or rule,

would have to be given notice; but it may be remarked with emphasis here that none of the certificate- or policy-holders are parties plaintiff to the bill in equity in the Federal Court; but only the judgment debtor, the defendant foreign corporation, which refused, after service upon its agent and the said Insurance Commissioner of the State, to appear in the State Court, and permitted the judgment to go against it by default, which judgment still remains unsatisfied in the said State Court.

The appellant in its argument before the Circuit Court of Appeals attempted to show that the Kentucky Court of Appeals has held void certain attachments not based upon sufficient service of summons. The cases cited in support of such contention do not sustain the doctrine and the analogy as announced. Admitting, however, the legal rule to exist in Kentucky as urged by appellant, it would only emphasize the propriety and avail of going to the Kentucky Court of Appeals to remedy the alleged error of the Jefferson Circuit Court instead of invoking the interposition of the Federal Court. Appellant by its own argument shows to this court that complete justice could have been secured by the ordinary appeal in the courts of Kentucky. From such considerations spring the proposition stated by Cook on Corporations in Section 863:

"The regularity, propriety, and validity of the appointment of a receiver can be questioned only in the court that appointed him, and only in direct proceeding to test that question."

Mr. Cook supports the above statement with numerous quotations from the courts of various States.

To sanction the course adopted by the Mutual Reserve Fund Life Association in this litigation would of necessity

mean that in every case pending before a State court, where defective or insufficient service of summons, either actual or constructive, has been had, the defendant without seeking relief from the State Circuit Court, without bringing the matter to the attention of the State Court of Appeals, could secure an intervention of the Federal Court, and thus control the State judiciary. A step farther in this line of reasoning brings us to the position that a State Appellate Court would never have an opportunity of establishing rules of practice and procedure, for the manifest reason that all such questions could and would be taken from the State Circuit Court to the Federal Circuit Court. Truly this leaves little of power and dignity in the State tribunals of justice.

A Question of Procedure Alone Involved.

The controversy as respects the receivership will upon close and correct examination resolve itself into a matter of procedure solely. The State Court certainly possessed authority to enforce its judgment. Appellees contend that the receivership was only a form of execution. But if more, the appointment without notice to adversary parties was still within the power of the court. So that there can be involved here only a question as to whether the procedure adopted by the State Court was according to established precedents.

Under the facts there is presented no question of "due process of law." A litigant is not entitled to any particular kind of procedure, nor does the "Fourteenth Amendment"

"Profess to secure all persons in the United States the benefit of the same laws and same remedies. Great diversities in these respects may exist in two States separated

only by an imaginary line." (Missouri v. Lewis, 101 U. S. 31; Brown v. New Jersey.)

"Due process of law is process due according to the law of the land. This process in the State is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme law of the land—that is to say, with the Constitution and laws of the United States made in pursuance thereof, or with any treaty made under the authority of the United States. (Art. VI, Const.) Here the State Court had decided that the proceeding below was in accordance with the laws of the State; and we do not find that to be contrary to the Constitution, or any law or treaty of the United States." (Walker v. Sauvinet, 92 U. S. 93.)

"The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution." (Brown v. New Jersey, *supra*.)

"The State is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law. Subject to the limitations heretofore named it may avail itself of the wisdom gathered by experience of the century to make such changes as may be necessary." (Hurtado v. California, 110 U. S. 516; Brown v. New Jersey, *supra*.)

"Accordingly, it is held that, although an indictment by grand jury was an essential preliminary to trial for felony at common law, it is within the power of the State to abolish it entirely and proceed by information." (Hurtado v. California, *supra*, etc.; Hodgson v. Vermont, 168 U. S. 262; Bollin v. Nebraska.)

"But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes give reasonable notice and provides fair opportunity to be heard before the issues are decided.

This being the case, it was obviously not a right, privilege, or immunity of a citizen of the United States to have a controversy in the State Court prosecuted or determined by one form of action instead of another. It is also equally evident, provided the form sanctioned by the State law gives notice and affords opportunity to be heard, that the mere question of whether it was by a motion or ordinary action in no way rendered the proceeding not due process of law within the constitutional meaning of those words." (Iowa Central Railroad Company v. Iowa, 160 U. S. 389.)

The appellant here can not in truth complain that it had no opportunity to be heard. The record shows that the Association immediately after the appointment of the receiver by the State Court entered its appearance in that court for the purpose of filing a petition for removal of the receivership proceedings. At the time of filing its bill of complaint in the U. S. Circuit Court, the receiver had collected no money belonging to the Association or in any way prejudiced its rights. Under the order of appointment the receiver was required to hold all property to the further administration by the court. The Association could have secured ample protection in the State Court. It proceeded as it did by reason of a desire to substitute the Federal Court for the State Court in the decision of the case.

It may be true, as appellant insists, that the "proceedings in the State Court was previously unheard of" and yet no question of "due process of law" is presented.

It might be admitted that the proceedings eventuating in the appointment of a receiver were not approved as good practice by the decisions in Kentucky. And yet, upon the very next submission of the question, the Court of Appeals might overrule all former announcements and hold the procedure by supplemental petition or affidavit the correct course. It is certainly not the province of the Federal

Court to perpetuate the first ruling of a State court of last resort on every question of procedure and practice.

The defendant was not injured by any action of the State Court. The receiver is, and was at the time of the appointment, one of the wealthiest corporations in Kentucky. Before being permitted to qualify, the receiver was required to execute bond in the sum of $3,000, and this bond has always stood between the Mutual Reserve Fund Life Association and the irreparable damage complained of in its bill. Had the defendant in the State Court prosecuted an appeal to the Kentucky Court of Appeals, and had it succeeded in reversing the Jefferson Circuit Court, every dollar collected by the receiver would have been paid to the company or returned to the policy-holders. Again, the plaintiff in the State Court, James S. Phelps, is and has been during the period covered by this case a man eminently solvent, with property subject to execution sufficient to reimburse the Association for any sum that he might have improperly secured through the medium of the receivership. These statements, while not appearing by positive allegation in the record, are but fair presumptions from the absence of anything to the contrary appearing in the cause.

The Motion to Remove was Properly Overruled.

Nor were the proceedings subsequent to the rendition of the judgment removable to the United States Court. This was decided by Judge Love in the case of Dere v. Strother, 10 Fed. Rep. 406, from which the following is quoted:

"Every court must, in the nature of things, have the right, as well as the power, to carry its own judgments into execution. To take from any court the prerogative of executing its own judgments by proper process or by supple-

mental proceedings, when necessary, would be to cripple its jurisdiction in a most essential matter. It would, therefore, be difficult to persuade us that Congress meant by the provision in the act of 1875 for the removal of 'suits of a civil nature' to authorize the transfer of controversies growing out of mere modes of execution and relief, thus directly interfering with the State courts in the execution of their own judgments. It is not in this sense that the words 'suits of a civil nature' are ordinarily used.

"Now, the process of garnishment after judgment is clearly a mode of execution. Its purpose is to obtain satisfaction of the judgment out of the debtor's effects which may be in a third person's hands. The garnishment, therefore, is inseparably connected with the judgment. If money is realized, it is to be applied to the satisfaction of the judgment. Suppose that an issue, taken upon the garnishee's answer, should be removed to the Federal Court (the original case remaining, as it must remain, in the State Court), and suppose the Federal Court should deliver judgment against the garnishee, and by execution or otherwise the money should be collected, how could the Federal Court enter satisfaction, the judgment not being under its control? We see in this the embarrassment that must arise from the attempt to separate the garnishment proceeding from the judgment, the latter remaining in one court and the former carried to another and different court."

In the case just quoted, the proceeding taken in execution of the judgment was a garnishment process. In the case at bar, the proceeding was, as held by the court below, "substantially that of garnishment." The prayer of the supplemental petition in the State Court sought a garnishment of all persons indebted to the defendant. The court, seeking to avoid "a multiplicity of parties and burdensome and expensive proceeding," appointed a receiver to accomplish the same result.

No case was shown permitting a removal.

Cook v. Whitney, 3 Woods, 715.

Clafflin v. McDermott, 12 Fed. Rep. 375.

The Cortes Co. v. Thannhausen, 9 Fed. Rep. 226.

Desty's Federal Procedure (9th Ed.), p. 448.

The petition for removal, if considered as contemplating the entire cause, certainly came too late. The original petition was filed on February 28, 1900, the defendant summoned March 1, 1900, the motion to remove made on August 22, 1900. Under the Kentucky practice the defendant has twenty days, after service of summons, to answer.

Fidelity Trust Co. v. N. N. & M. V. Co., 70 Fed. Rep. 403.

No Trust Fund. No Multiplicity of Suits.

Judge Evans, in his opinion herein, says:

"Whether the fund raised by the complainant from mortuary calls and premiums is a trust fund for all its members which can not be diverted to the benefit of a mere creditor is an important question. Ordinarily we might say that such a fund could not be subjected to a creditor's demand in a case like the one in the State Court and by process, which, if anything, is substantially that of garnishment."

The bill of complainant does not contain any allegation justifying such a conclusion on the part of the court. There is no claim made that the entire income of the company was a trust fund exempt from the debts of creditors. The facts, not oversight or lack of disposition, were responsible for the absence in the bill of such statements as are found in the opinion. The dues of the Association are collected for general expenses, never for death losses. The assessments and mortuary calls are determined as to amount, not in view of actually matured death claims, but are arbitrarily fixed to meet all demands to accrue prospectively against the company. The judgment which the appellant, Phelps, sought to collect in the State Court was but a restoration to him of

money which the defendant Association had collected and used for the benefit of its members. These members can therefore not complain when required to return what they have illegally secured and wrongfully retain.

In any event, however, the State Court was the proper tribunal to determine the character and identity of the fund sought to be subjected to the payment of plaintiff's judgment. The following cases are cited as sustaining this view of the law:

The Missionary Society v. Hinman, 13 Fed. Rep. 161. Opinion by McCrary, C. J., Nebraska.

The property of the Missionary Society had been levied upon under a writ from the State Court. The society asked an injunction of the Federal Court to restrain proceeding by the State Court officers on the ground that the property levied upon was trust property and exempt from execution. Upon this contention the court decided:

"Whether this property is trust property belonging to the complainant as trustee, or individual property of the respondent, is one of the questions in dispute between the parties, and is indeed the very question which must be determined by the State Court in the replevin suit. . . . Now, it is perfectly clear that while this injunction is maintained the State Court can not go on and adjudge the possession of the property to be in the respondent. The injunction forbids the respondent to take possession of or to hold the very property which the State Court has directed its officers to place in his hands."

The court then reviews the case in the light of Section 720 of the Revised Statutes, and dissolves the injunction theretofore granted.

Beckett v. Sheriff, 21 Fed. Rep. 32. Opinion by Judge Bond for the Circuit Court of Maryland:

"It is equally clear that no court of the United States has the jurisdiction to take into its possession property

which has been seized and taken into the possession of a State court by any process of that court. And the comity of the courts forbids any such interference between the one and the other. The parties are to seek their remedy in the court whose officer is alleged to have offended, but he can not be arrested by any other court of concurrent jurisdiction. He would be placed in the singular position, in contempt of one court for obeying a writ and of another for not obeying it."

Simpson v. Ward, 80 Fed. Rep. 561. Complainant contended that the Supreme Court of the State was wholly without jurisdiction of the subject-matter, and that the judgment appointing a receiver and ordering a sale was wholly void. Circuit Judge Lacombe, speaking for the Circuit Court, S. D. of New York, remarks:

"It was open to him to apply to the State Court for leave to present the objection to such proceeding, which is now relied upon. The State Court was the proper tribunal to pass upon that objection, since it is a question of the construction of a State statute regulating special proceedings for dissolving State corporations. Complainant by failing to make any effort to present this objection in the proper forum and at the proper time, has been guilty of such gross laches that he is in no position to invoke the favorable consideration of a court of equity, or to ask for an injunction to restrain the receiver appointed by the State Court from carrying out its instructions."

Little need be said respecting the allegation contained both in the bill of complainant and the opinion of the court, that an injunction should issue to prevent a multiplicity of suits threatening in the State Court. In the first place, no suit would have been necessary, as funds sufficient to pay the judgment debt would have been collected by the receiver without further litigation. If suits had been required, of the kind and in the number suggested by the complainant, they could not and would not have affected the defendant

Association. The only parties to an action instituted by the receiver would have been the court's officer and the defaulting policy-holder. The Mutual Reserve Fund Life Association would not have been a proper party, and no liability, even for costs, could have accrued against it. In this aspect of the case it is difficult to understand how the Association can properly complain of a threatened multiplicity of suits, or how any ruling of the court can be predicated thereon. None of the policy-holders or members of the Association, the only persons concerned, appear in this cause either as complainant or defendant.

The United States Circuit Court was Without Power or Authority to Enjoin.

What has previously been said may in a certain way be considered a preface to this chapter of the argument. It is desirable that the court should understand and appreciate the merits of this controversy; but the subject now to be discussed is of larger consequence. That, because this phase of the case must exercise a controlling influence upon the court. More important still is this feature of the cause in its bearing upon the public tranquility. Burke has stated the first and foremost object of the law to be "the preservation of the peace." Recognizing this proposition as indisputable, the authority of any court to invite violence and conflict becomes a matter worthy the most serious reflection. Appellees hope to show that the injunction issued by the lower court, which menaced a community with the evils of forcible conflict between State and Federal officials, was in opposition to every principle of the law.

Section 720 of the Revised Statutes of the United States, the rules of comity in vogue among courts of concurrent

jurisdiction, and the common sense of the situation, all deny to the U. S. Circuit Court the power to issue the injunction found on page 9 of the record.

The section referred to reads as follows:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

Judge Evans felt at liberty to promulgate the order of injunction upon the idea that, having held void all steps taken by the State Court in the matter of the receivership, Section 720 could have no application. Says the court in its opinion:

"The orders appointing the Fidelity Trust & Safety Vault Company, Receiver, being simply nullities, that Company is not an officer of the State Court, and enjoining it in no way enjoins a proceeding in the State tribunal."

It is difficult to grasp the logic of such conclusion. If the amended and supplemental petition filed by the plaintiff in the State Court, upon the allegations and prayer of which the Receiver was appointed, was a suit in equity, then it was authorized by Section 439 of the Kentucky Code. If it was not a suit in equity, but ancillary action taken by the court upon an affidavit labeled an "amended and supplemental petition," then a court of equity had the right, looking to substance and not form, to take the steps noted in the case. In any event there was a PROCEEDING in the State Court.

On page 27 of the record will be found a petition for removal filed in the State Court on August 22, 1900, by the appellant here, in which the steps held by the circuit court to have been "no proceeding" are referred to as "an equita-

ble *action* apparently based or sought to be maintained upon the authority of Sec. 439 of the Code of Practice." In another portion of the petition for removal the Association refers to the case in the State Court: "In said action or suit, the plaintiff, as a basis for attachment or receiver, asserts, etc." Again, in its bill filed in this cause, complainant refers to those same steps, so lightly considered by Judge Evans, as "a *case* or *proceeding* based upon the said so-called amended and supplemental petition." "Your orator exhibits with this bill, as a part thereof, duly certified copies of the *proceedings* consequent upon the said amended and supplemental petition." (Record, pages 5 and 6.)

The situation is admirably stated by the Circuit Court of Appeals:

"The position of the court below, and of the counsel for appellee (appellant here) is that, if the State Court exceeded its jurisdiction by assuming to appoint a receiver in aid of the enforcement of its own judgment without a new summons or notice, the proceedings under which its jurisdiction in that respect was regarded as not being a 'proceeding' within the meaning of Section 720, and that a receiver appointed under such circumstances is not in any sense an officer of the State Court, and that an injunction against such an interloper is 'in no way enjoining a proceeding in a State Court.' To so narrow a construction of the term 'proceedings in any court of a State' we can not assent, and no authority has been produced which sanctions any such definition. The supplemental petition filed in the primary suit was an appeal to the supposed power of the court to order any other or further writs or process necessary to compel payment of its judgment. The petition constituted a 'proceeding' in court, whether we regard it as a new action or as a mere collateral and supplemental pleading. In point of fact the 'proceeding' was regarded neither by the State Court nor by the party filing it as a new action, but as a collateral and supplemental appeal to the continuing jurisdiction of the court until its judgment should be satisfied; and if the action of the State Court is subject to criticism, it is because, when its jurisdic-

tion was thus invoked, it erred in assuming that it might act upon the constructive notice of the primary suit, and without a new writ of summons or any other notice.

"But does it follow, because the State Court exceeded its jurisdiction by thus appointing a receiver in aid of its own judgment without notice, that a court of the United States, upon the application of the judgment debtor and in defiance of the injunction, which forbids any interference with the receiver in the discharge of his duties, may enjoin that receiver from obeying the order of the court, whose officer he colorably was, or dispossess him from the custody of the property which he had been directed to hold? There is no pretense of any prior suit involving the same controversy in the United States Court, nor of any prior possession, constructive or actual, of the *res* which the receiver was ordered to reduce to possession. The injunction of the State Court, forbidding interference with its receiver, is met with a counter injunction forbidding the receiver to proceed with the duties of his appointment, and forbidding his interference with the property of the Mutual Reserve Fund Association, which the State Court had specifically directed him to take possession and custody of. Which court shall the receiver obey? Unless one court or the other shall yield its pretensions, nothing remains but an appeal to force. Fortunately, the State Court, while justifying its action in an opinion of vigor, but commendable courtesy, has directed its receiver to apply to the Circuit Court to discharge its injunction, and to appeal to this court from any other order continuing in operation.

"If there are principles of comity or of statutory construction by which so deplorable a conflict between co-equal courts of concurrent jurisdiction may be avoided, and the operations of our independent systems of judicature rendered harmonious, it is our highest duty to discover and apply them."

Away back in 1807, in the case of Diggs and Keith v. Wolcott, 4 Cranch, 179, it was held by all the Judges of the Supreme Court of the United States, when Marshall was Chief Justice, that the Circuit Court of the United States had no jurisdiction to enjoin proceedings in a State court. The State and Federal courts are, as to each other,

co-equal, independent, foreign forums, judicatures of different systems under two different sovereignties, two separate governments. They are of equal power and dignity, have no common superior, while both exercise in many matters concurrent, co-ordinate jurisdiction, within the same territorial limits. Neither one is responsible to the other; neither one has any appellate authority, jurisdiction or supervisory power over the other; nor has either one the right to supersede, impede or obstruct the jurisdiction of the other, or the power to annul, alter, or modify the orders or judgments of the other, nor to wrest property from the receiver or ministerial officers of the other, held by said receiver or officers under color of legal process issuing from said courts. Neither has power or authority, by injunction or otherwise, to interfere with or prevent receivers or ministerial officers of the other from obeying the mandates, writs or processes of the court issuing the same. Nor has either of said courts right, power or authority to impede or obstruct the other court in the discharge of its juridical, remedial functions, or prevent it from fulfilling its judicial duties.

"These are legal postulates, recognized and enforced by the ablest and most enlightened jurists that have adorned the Supreme bench of the United States and the Federal Circuit benches throughout the United States since the foundation of the Government. The question, therefore, in this case is not a new one, nor determinable upon any novel principle. There is no room here for the play of the faculties of juridical originality and invention. The law upon this subject is a beaten, time-worn, and honored highway, recognized and respected by all citizens, and by the bench and bar of the Union. The doctrine of non-interference by the Federal Courts with the proceedings in the State Courts is a highly important question to the bench and bar of the country, both State and Federal, and to the public at large,

as it affects materially the efficient administration of remedial justice in the State courts, the time-honored principles of which, if departed from or violated, invites and necessarily involves a collision between the State and Federal authorities. Happily for the legal profession and for the country the question presented in this record has received such frequent and comprehensive solutions at the hands of the great jurists of the Union on the Federal bench, both in the Circuit and Supreme Courts, that the only wonder is that a necessity should at this late date again arise for the invocation of those well-established and fundamental principles, by which the judicial sovereignties of the Federal and State courts have been so long governed. Indeed, it is not a matter of comity at all that the Federal Court should not interfere by injunction with the proceedings in the State Court, except in matters of bankruptcy; it is a matter of right, of law, of necessity—nay, of positive statute.

If the injunction in this case is warranted, then the act of Congress, *supra*, passed March 2, 1793, and which has been followed over a hundred years with remarkable unanimity in the courts, is a dead letter upon the Federal statute book. If this injunction is warranted and authorized, then the boasted independence of the State judiciary is a delusion, its assumed power to uphold and enforce its decrees a mockery, and its true status, as an inferior tribunal, subject to the supervisory control of the Federal Courts, is indeed ignominious and contemptible."*

But, as we shall show, the courts of the United States have been as careful to avoid any interference with the sovereignty of State courts as those courts have been jealous of their own power and dignity. The decision of the Federal Circuit Courts, the Circuit Courts of Appeal, and the Supreme Court of the United States present a line of authorities broken for the first time by the judgment entered by the Circuit Court, but set aside by the Circuit Court of Appeals.

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*Extract from opinion of Judge Toney, of Jefferson Circuit Court, on directing the receiver to prosecute appeal in Federal Courts rather than resort to force in maintaining the State Court's rights.

In Taylor v. Carryl, 20 Howard, 583, opinion by Mr. Justice Campbell, the learned court, speaking through that eminent jurist, after reviewing the decisions of the courts of England upon the same question, even there where they have no distinct system as we have in this country, said, referring to the English courts:

"Those courts take efficient measures to maintain their control over property within their custody, and support their officers in defending it with firmness and constancy. The court of chancery does not allow the possession of its receiver, sequestrator, committee or custodee to be disturbed by a party, whether claiming by a title paramount or under the right which they were appointed to protect (Evelyn v. Lewis, 3 Hare, 4725; Madd. 406), as their possession is the possession of the court (Noe v. Gibson, 7, page 713). Nor will the court allow an interfering claimant to question the validity of the orders under which possession was obtained, on the ground that they were improvidently made. (Russell v. East Anglien R. Co., 3 McN. and Gord. 104.) The courts of law uphold the right of their officers to maintain actions to recover property withdrawn from them, and for disturbance to them in the exercise of the duties of their office.

"But it is in this Court (that is, the Supreme Court of the United States) that the principle stated in Payne v. Drew (4 East 553, Lord Ellenborough) has received its clearest illustration and been employed most frequently and with most benignant results. It forms a recognized portion of the duty of this court to give preference to such principles and methods of procedure as shall serve to conciliate the distinct and independent tribunal of the State and of the Union, so that they may co-operate as harmonious members of a judicial system co-extensive with the United States, and submitting to the paramount authority of the same Constitution, laws, and Federal obligations. The decisions of this Court that disclose such an aim, and that embody the principles and modes of administration to accomplish it, have gone from the court with authority, and have returned to it, bringing the vigor and strength that is always imparted to magistrates, of whatever class, by the approbation and confidence of those submitted to their government."

And in Peck v. Jennes, 7 Howard, 612, opinion by Mr. Justice Grier, we find this language:

"The acts of Congress point out but one mode by which the judgments of State courts can be revised or annulled, and that is by this Court, under the 25th section of the Judiciary Act. In certain cases, where one of the parties is a citizen of another State, he has the privilege of removing his suit to the courts of the United States. But in all other respects they are to be regarded as equal and independent tribunals. It is a doctrine of law too long established to require a citation of authorities, that, when a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether the decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right can not be arrested or taken away by proceedings in another court. These rules have their foundation not merely in comity, but on necessity. For if one be enjoined, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice. In the case of Kennedy against the Earl of Cassilis, Lord Eldon at one time granted an injunction to restrain a party from proceeding in a suit pending in the Court of Sessions of Scotland, which, on more mature reflection, he dissolved; because it was admitted, if the court of chancery should in that way restrain proceedings in an independent foreign tribunal, the Court of Sessions might equally enjoin the parties from proceeding in chancery, and thus they would be unable to proceed in either court. The fact, therefore, that an injunction issued only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum." Cited with approval in Bank v. Stevens, 169 U. S. 460, opinion by Mr. Justice Shiras.

Covell v. Heyman, 111 U. S. 179, is perhaps the leading case on the question here involved. What follows is taken from the opinion in that case rendered by Mr. Justice Matthews:

"The point of the decision in Freeman v. Howe, *supra*, is, that when property is taken and held under process, mesne or final, of a Court of the United States, it is in the custody of the law and within the exclusive jurisdiction of the Court from which the process was issued for the purpose of the writ; that the possession of the officer can not be disturbed by process from any State Court, because to disturb that possession would be to invade the jurisdiction of the court by whose command it is held, and to violate the law which that jurisdiction is appointed to administer; that any person, not a party to the suit or judgment, whose property has been wrongfully, but under color of process taken and withheld, may prosecute, by ancillary proceedings, in the court whence the process issued, his remedy for restitution of the property or its proceeds while remaining in the control of that court; but that all other remedies to which he may be entitled, against officers or parties, not involving the withdrawal of the property or its proceeds from the custody of the officer and the jurisdiction of the court, he may pursue in any tribunal, State or Federal, having jurisdiction over the parties and the subject-matter. And, *vice versa*, the same principle protects the possession of property while thus held, by process issuing from State courts, against any disturbance under process of the courts of the United States; excepting, of course, those cases wherein the latter exercise jurisdiction for the purpose of enforcing the supremacy of the Constitution and laws of the United States.

"That which can not be done by final process is equally out of reach of original or mesne process.

"The forbearance which courts of co-ordinate jurisdiction administered under a single system exercise toward each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity with perhaps no higher sanction than the utility which comes from concord; but between State courts and those of the United States it is something more. It is a principle of right and of law, and, therefore, of necessity.

It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent and have no common superior. They exercise jurisdiction, it is true, within the same territory but not in the same place, and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process and the decisions of questions relating to it are part of the jurisdiction of the court from which it issues.

"The jurisdiction of a court, said Chief Justice Marshall, is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process, subsequent to the judgment, in which jurisdiction is to be exercised. Wayman v. Southard, 10 Wheat. 1.

"The principle which defines the boundaries of jurisdiction between the judicial tribunals of the States of the United States, the application of which effectually prevents their confusion, was set forth and vindicated in the judgment of this court in Ableman v. Booth, 21 How. 506 (62 U. S. XVI. 169). It was there said by Chief Justice Taney, p. 516 (173), 'That the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court as if the line of division was traced by landmarks and monuments visible to the eye.' And speaking of the procedure in cases of habeas corpus, issued under State authority, and admitting the duty of the officer of the United States, holding the prisoner under its process, to return the fact and show his warrant, the Chief Justice continues: 'But after the return is made and the State judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of habeas corpus nor any other process issued under State authority can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offense against their laws, their tribunals alone can punish

him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress. . . . No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and any attempt to enforce it beyond these boundaries is nothing less than lawless violence.' And in Tarble's case, 13 Wall. 397 (80 U. S. 597), commenting on this language of Chief Justice Taney in Ableman v. Booth, *supra*, Mr. Justice Field points out that it was not intended merely to meet cases where the authority of the United States was undisputed, but cases where its validity was questioned, and it appeared that the prisoner was held under claim and color of such authority, in good faith, and not by way of mere pretense and imposition. And the exclusive authority of the court issuing the writ extends, not only to the decision of all questions affecting its jurisdiction and the form and force of the writ itself, and the validity of the proceeding in issuing and executing it, but also of all questions affecting the identity of the person or property seized and held under color of its authority, and the right to exempt them from its operation.

"It does not avail, therefore, to say that, as the writ commands the officer to take the property of the defendant, he can not under that claim take and hold the property of another; because the property which he does actually take, he takes and holds as the property of the defendant, claiming to be such, and therefore he has it in his possession under color of process and claim of right."

The court will find no more instructive case than Senior v. Pierce, 31 Fed. Rep. 628, an opinion prepared by Judge Love sitting for the Circuit Court, District of Iowa. In the opinion, Judges Brewer and Shiras concurred. We quote it extensively:

"The more recent case of Covell v. Heyman, cited *supra*, is entirely conclusive of the questions now before the court. In that case the cases which preceded it were reviewed and explained in terms which leave no doubt whatever as to the rule which should be applied to the matter now at bar. Covell v. Heyman was an action by which the State court of Michigan took from the United States marshal certain per-

sonal property which it was alleged the marshal had wrongfully seized under a writ of execution issued upon a judgment of the Circuit Court of the United States for the Western District of Michigan. The Supreme Court review at length the case of Freeman v. Howe, and expressly sanction and approve the doctrine of that case."

Covell v. Heyman is quoted by the court, which then continues:

"Since, then, property in the hands of an officer of court under legal process is to be considered as in the custody of the court, the officer would clearly have no right to surrender it without an order of the court to whom he owes obedience; and therefore an attempt of an officer of an alien jurisdiction to take the property out of the possession of the officer holding it must, inevitably, either prove futile or lead to a forcible collision. Would the officer in possession be justified in surrendering the property at the mandate of a court foreign to him and without any power whatever to give him protection against the orders of his own court?

"The State and Federal Courts of original jurisdiction are independent of each other. They are equal in power and dignity. The courts of one jurisdiction have no authority or right whatever to command or coerce the courts of the other jurisdiction. How, then, could the Federal Court take property from the custody of the State court against its consent without the use of actual force? But if one jurisdiction may use force, why not the other? Why, if the Federal Court may exert force to take property from the possession of a State court, may not the latter in its turn wrest property from the Federal Court by the same means? Nothing is more evident than that whatever a Federal Court may lawfully do to take property from the State Court, the latter may also in like circumstances do to withdraw property from the possession of a Federal Court. This power, if it exists, must be reciprocal.

"It has been argued that the proceedings before the magistrate who issued the warrant of seizure were irregular; that, in order to give him jurisdiction, the statute should have been strictly pursued, and that consequently the custody of the State officers is without jurisdiction and void. Conceding all this, we are at a loss to see how the question

before us is thus materially affected; for it is nevertheless true that the property in question is in possession of the State court under color of legal process. The case was appealed from the judgment of the justice of the peace to the State district court, and the property is now, therefore, in the custody of that court. How is this court to obtain possession of it without the consent of the State district court, unless by a resort to force to wrest it from the custody of the officer of that court? Suppose we decide that the proceeding was irregular, and the seizure without warrant of law, and void, and suppose the State court holds just the contrary, how is the conflict of judgment between us to be settled? And, if one court, or the other, shall not yield, how is a collision of forces to be avoided? Why should the State court, which first got possession of the property and the controversy, yield to the claim of jurisdiction by this court? By what right, law or authority can this court claim superiority to the State court, or any paramount competency to hear and determine the matter at issue?

"Inasmuch as the very purpose of non-interference is to prevent a conflict between the two jurisdictions, I can see no difference in the application of the principle whether the question to be decided by the two courts is one of jurisdiction or of mere property right, the jurisdiction being conceded. The State court must needs decide for itself whether or not the seizure proceeding was illegal. There is no other tribunal with competent authority to decide this question for the State court. If the Federal Court may decide the question of the regularity of the seizure and jurisdiction adversely to the State court, and proceed to take the property from its custody by force, why may not the State court reciprocally in any parallel case decide the same question when property is in our custody, and proceed by a writ of replevin to dispossess the Marshal? But assuredly, if the Federal Court were in possession by legal process, it would not permit the State court to decide the question of jurisdiction, and wrest the property from our control. The only safe and legitimate course for the suitor is to pursue his remedy by some proper ancillary proceeding in the court first obtaining jurisdiction, and take his appeal, if not satisfied, to the final justice of the Supreme Court of the State, or of the United States, as the case may require. It will not do for the suitor to assume that he can not obtain justice in one jurisdiction or the other. But at all events, it is

infinitely better that injustice should be done and suffered in particular cases than that a course of proceeding should be sustained fraught with all the evils of conflicting judgments and forcible collisions between the two independent jurisdictions."

Senior v. Pierce will be found followed with approval in many subsequent cases.

Dohn v. Ryan, 31 Fed. Rep. 638, opinion by Judge Shiras; Rothschild v. Harbrook, 65 Fed. Rep. 284, opinion by Judge Woolson; In re Hall, 73 Fed. Rep. 530, opinion by Judge Wellborn.

Leathe v. Thomas, 97 Fed. Rep. 136. Opinion of the Circuit Court of Appeals, Seventh Circuit, by Judge Baker.

The bill of complainant sought an injunction against the Sheriff from proceeding with the collection of an execution. The court quotes Section 720, Revised Statutes, and proceeds:

"It is contended that the restraining order does not stay any proceeding in the State court, and that its only purpose is to control the action of the ministerial officer. The prohibition of the statute does not extend to proceedings in a court of the State up to and including final judgment only, but to the entire proceedings from the commencement of the suit until the execution issued on the judgment or decree is satisfied. (Wayman v. Southard, 10 Wheat. 1.)

"Jurisdiction is the power to hear and determine the subject-matter in controversy in the suit before the court, and the rule is universal that if the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree, and that jurisdiction continues until that judgment or decree is satisfied. . . . The section above cited (720) is not the only obstacle which prevents the sustaining of the order of injunction. The principle of comity which obtains between courts of concurrent jurisdiction forms a recognized part of their duty. It is firmly established that the application of this principle forbids the courts of the States from interfering by injunction with the mesne or final process

of the courts of the United States; and the same principle in like manner forbids the courts of the United States from interfering by injunction or otherwise with the mesne or final process of the courts of the State."

Mills v. The Provident Trust Co., 100 Fed. Rep. 344. Opinion of the Circuit Court of Appeals, Ninth Circuit, by Judge Ross:

"The bill alleges that the defendant, Mills, as Sheriff of Pierce County, is proceeding to sell property under the writ to satisfy a judgment against the Tacoma National Bank. That the said bank has no legal nor equitable interest in said property, but that the property at all times was the property of the complainant. That such proceedings are illegal, wrongful, and unjust, and will cast a cloud upon the property of complainant, who was not a party to the suit, nor in any way concerned therein."

Upon this state of fact, the court quotes Section 720 of the Revised Statutes, and comments as follows:

"That the levy and sale under an execution issued upon a judgment rendered by a State court is a 'proceeding' in the State court within the meaning of this provision of the Revised Statutes, does not, we think, admit of doubt. . . But the court below was of the opinion that that section applies only to parties and privies to the action in the State court and to cases where the property is subject to the State judgment and writ issued thereon.

"The same view was put forward in the case of the Association against Hurst, 7 C. C. A. 598, but the Circuit Court of Appeals for the Sixth Circuit held, and we think, properly held, to the contrary. In the course of its opinion the court, in that case, showed that the principle underlying the rule of comity not only operates to prevent the interference by one court with the acts of the executive officers of another court of co-ordinate jurisdiction, when done under color of an order or process issuing from such other court in respect to the possession of personal property, but applies as well to an injunction against the levy on and sale of real estate by the officer under color of process; adding that the 'purpose of the statute is so important that a liberal con-

struction should be given to accomplish it.' In this we entirely agree.'' The decision of the lower court, 91 Fed. Rep. 435, was accordingly reversed.

Southern Bank v. Thornton, 75 Fed. Rep. 929. Opinion of the Circuit Court of Appeals, Sixth Circuit, by Judge Lurton:

"The effect of the levy of the attachment issuing from the State Chancery Court, and the return of the writ into court under the Tenn. Statutes and decisions, was to place the attached land within the control and possession of the State Court. It was an actual seizure of the *res*, and thereby passed into the exclusive possession of the court as fully as if a receiver had been appointed. Cooper v. Reynolds, 10 Wall. 308. However defective the proceeding under which the attachment issued, it would not follow that the State Court was without jurisdiction. The object of the bill was to subject the land attached as the property of the Iron Company to the satisfaction of its debts. For this purpose the land itself was seized, and thus drawn within the jurisdiction of the court by this assertion of control and power over it. The validity of that act of power and authority could not be questioned by another court so long as the State Court retained the possession thus acquired.

"The injunction restraining the execution of the decree of the State Court was equally unwarranted, and was in violation of the provisions of Sec. 720 of the Revised Statutes of the United States. That the land ordered to be sold was the property of the suitor invoking the injunctive process of the United States Court is no justification. The binding force of that very wise and conservative statute does not depend upon the real or ultimate rights of the respective claimants of the property involved, or the regularity of the proceedings sought to be stayed. The statute prohibits any injunctive restraint upon the proceedings of a State Court, and jurisdiction is not conferred by vigorous allegations touching the injustice or invalidity of the objectionable proceedings.

Freeman v. Howe. 24 How, 450;
Covell v. Heyman, 111 U. S. 176;
Buck v. Colbath, 3 Wall. 334;
Association v. Hurst, 16 U. S. App. 325."

In re Hall, 73 Fed. Rep. 530. Opinion by Judge Wellborn sitting for the Circuit Court for the S. D. of California:

"The reasoning of this extract unanswerably sustains what has already been said in reference to the matter of possession. Petitioner, however, insists, that the distinguishing feature of the rule of comity is not the possession of the property by the court, but the jurisdiction of the court over the property. Probably there can be found in some of the cases isolated expressions which give countenance to this contention, but it will not bear the test of careful investigation. Wherever, in such cases, the word 'jurisdiction' is employed in this connection, the context, I think, will disclose that it is used synonymously with 'possession.'"

American Association v. Hurst, 59 Federal Rep. 5. Opinion of Circuit Court of Appeals, Sixth Circuit, by Judge Taft, in a case where a total stranger to the State Court proceedings was seeking aid of Federal Court in protection of his property:

"The principle of the decision in Freeman v. Howe, Buck v. Colbath, and Covell v. Heyman has a much broader application than counsel for appellant concede. The principle is that in order to preserve the dignity and protect the effectiveness of the process of courts of concurrent jurisdiction, and to avoid unseemly conflicts between them and between their respective executive officers, no remedy of an injunctive or dispossessary character will be afforded by one court against the acts of the executive officers of the other court when done under color of an order or process issuing from such other court, because it would have the inconvenient and anomalous effect to stay the proceedings in one court to allow another court to investigate the validity of acts done under such proceedings. A replevin of personal property in the hands of its officer, or an injunction against a levy upon personal property by such officer, will certainly not more offend the dignity of the court or more interfere with the due discharge of business before it than will an injunction against a levy on real estate by its officer under color of its process. Moreover, the acts which it was here sought to enjoin were not mere levies upon real estate, but

were the sale of it, and the execution of a deed to the purchaser with a possible writ of possession, or at least with title upon which to found ejectment; so that even if the principle of Freeman v. Howe, and other like cases, only applies when there is to be a conflict of possession between one court and another, we think the remedy here sought would come within their inhibition."

In the case last cited the interposition of the Federal Court was sought and an injunction asked on the ground that the State Court was acting without its jurisdiction, and that there had been no valid proceeding. This contention was made for the purpose of saving the suit in the Federal Court from the prohibition of Section 720 of the Revised Statutes. But Judge Taft refused to consider the question as to whether the action of the State Court was or was not a valid proceeding on the ground, as he states, that "all proceedings of a State Court are inviolate from injunctive interference by the Federal judiciary."

Hutchinson v. Green, 6 Fed. Rep. 838. Opinion by Circuit Judge McCrary, sitting in the Eastern District of Missouri:

"The rule is that no injunction shall be granted by any court to interfere with the possession, control, or disposition of property which is in the hands of another court of coordinate jurisdiction. The reason for the rule is that its disregard would lead to conflicts between courts of equal authority and recognizing no common arbiter, which conflicts might lead to the most serious and disastrous consequences. The great importance of the strict observance of this rule in the administration of justice in our State and Federal Courts has always been recognized in both forums, and for reasons which at once suggest themselves as very cogent. I am disposed, so far as I am concerned, to uphold it fully, and even in cases of doubt to lean toward the adoption of that view which can not possibly lead to conflict."

Rensselaer R. Co. v. Bennington R. Co., 18 Fed. Rep. 617. Opinion by Judge Wheeler, sitting for the Circuit Court for the District of Vermont:

"This bill is brought to restrain the defendant from entering upon the railroad of the orator, on the ground that the contemplated invasion is under a decision of the State Court based upon a void statute of the legislature.

"In Section 720 of the Revised Statutes it is provided that the writ of injunction shall not be granted by a court of the United States to stay proceedings in any court of a State, except when authorized in bankruptcy proceedings. This provision of the statutes is strictly applied wherever the restraint of any independent proceedings of a State court is attempted. Haines v. Carpenter, 91 U. S. 254; Dial v. Reynolds, 96 U. S. 340. Suits in State Courts, wherein it is attempted to defeat the result of proceedings in the Federal courts, have been enjoined in the Federal courts on the ground that such courts must have full control over the enforcement of their judgments and decrees, as well as of the rendering of them. Deitzsch v. Huidekoper, *supra*; French v. Hayes, *supra*. Mr. Justice Bradley, in delivering the opinion of the court in Haines v. Carpenter, said: 'In the first place, the great object of the suit is to enjoin and stop litigation in the State courts, and to bring all the litigated questions before the Circuit Court. This is one of the things which the Federal courts are expressly prohibited from doing.' The right of citizens of other States to have their litigation generally, and the rights of all to have Federal questions tried in the Federal courts, are provided for by the statutes relating to the removal of cases from the State to Federal courts, and to writs of error from the Supreme Court of the United States to the highest court of the State, and are not left at all to be effectuated by injunction from one court to the other."

Yick Wo v. Crowley, 26 Fed. Rep., p. 207. Opinion by Judge Sawyer, sitting for the Circuit Court for the District of California.

In the bill the complainant alleges that Crowley is the chief of police of San Francisco, and that he is about to

arrest complainant. The procedure being alleged to be based on a void ordinance, "the injunctive process of the Federal Court is prayed":

"In the bill the court is asked to restrain the execution of process issued by a State court and placed in the hands of the Chief of Police, whose duty it is to execute that process. The service of process is a proceeding in court.

"The proceedings which are here sought to be restrained are proceedings in a State court, in which warrants have been issued against the complainant and many others, and placed in the hands of the executive officer of the court for service. It is sought to enjoin the service of process, which would be to stay the proceedings and prevent the court from acting in the case. This is clearly within the prohibition of the statute, as repeatedly construed by the courts; and this court has no authority to restrain those proceedings. Within the last fifteen years a great many applications, under a great variety of circumstances, have been made in this court for preliminary injunctions to restrain proceedings in the State courts in civil causes, and they have invariably been denied. This court has no authority to restrain proceedings first commenced in a State court, nor has a State court authority to restrain proceedings in this court. The court, therefore, has no jurisdiction to grant the relief sought in this bill."

To the same effect is Rhodes Manufacturing Co. v. New Hampshire, 70 Fed. Rep. 72.

Dillon v. Kansas City R. Co., 43 Fed. Rep. 111. Opinion by Judge Phillips, sitting for the Circuit Court for the W. D. of Missouri:

"Section 720 of the Rev. St. was an addition to the act establishing the judicial courts of the United States, passed as early as March 2, 1793, and this limitation on the jurisdiction of Federal Courts was placed upon the statute to give the force of positive law to this rule of comity, in order to preserve the essential and necessary comity between the Federal and State courts, and to maintain the independence of each. . . .

"So here the Belt Railway Company, under the authority of the State statutes, claims that in the condemnation proceedings in progress in the State Court, after the coming in and filing of the report of the Commissioner, and the payment into the clerk's office of the damages assessed, it has a right to enter upon the tracks of the Missouri Pacific Railway Company for the construction of the proposed crossing. The contention of counsel for the Missouri Pacific is that such asserted right is premature at said stage of the proceeding in the State court, and can not be lawfully asserted until after disposition of the exceptions to the report, and after the exercise of the right of a trial *de novo* before a jury, at its demand. But that is the very question in controversy and pending in the State court, which it is competent to decide; and the unavoidable effect of a decree of injunction from this court is to stay the right of entry claimed by the party seeking the condemnation in the proceeding in the State court, and to draw the litigation and determination of that very question in this court. And if the order and decree of this court is to effectuate and accomplish the manifest purpose of this application for a writ of injunction, it must stop and foreclose any further proceedings in the State court. We can not shut our eyes to obvious facts, and hear only the form and semblance of things."

Missouri R. Co. v. Scott, 13 Fed. Rep. 793. Opinion by Judge Pardee, sitting for the N. D. of Texas:

"Section 720 of the Revised Statutes provides: 'The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.' This statute prevents this court from granting the injunction asked for, even if the complainant has otherwise a proper case for such relief. . . . The case here, where we are asked to enjoin all further proceedings, is one where the State court undoubtedly had prior jurisdiction, and the question as to whether that jurisdiction is ended is in dispute between the parties; the State court undoubtedly still claiming jurisdiction notwithstanding the petition and bond filed therein to remove the case to this court.

"The injunction asked for must be refused."

In Tarble's case, 13 Wall. 401, Mr. Justice Field deals at length with the subject of the respective authorities of State and Federal courts:

"The constitution, as said by Mr. Chief Justice Taney, 'was not framed merely to guard the State against danger from abroad, but chiefly to secure union and harmony at home; and to accomplish this end it was deemed necessary when the constitution was framed, that many of the rights of sovereignty which the States then possessed should be ceded to the general government; and that in the sphere of action assigned to it, it should be supreme and strong enough to execute its own laws by its own tribunals without interposition from a State or from State authorities.

"Such being the distinct and independent character of two governments within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other. In their laws and mode of enforcement neither is responsible to the other. How their respective laws shall be enacted, how they shall be carried into execution; and in what tribunals and by what officers, and how much discretion, and whether any, at all, shall be vested in their officers, are matters subject to their own control, in the regulation of which neither can interfere with the other.

"Some attempt has been made in adjudications to which our attention has been called to limit the decision of this court in Ableman v. Booth and U. S. v. Booth to cases where a prisoner is held in custody under undisputed lawful authority of the United States, as distinguished from imprisonment under claim and color of such authority. But it is evident that the decision does not admit of any such limitation."

Gates v. Bucki, 53 Fed. Rep. 964. Opinion by Justice Shiras, sitting for the Circuit Court of Appeals for the Eighth Circuit.

Suit by Charles L. Bucki against Victor and Ferdinand Gates, in which an interlocutory injunction was granted by the Circuit Court restraining Gates from applying to a

State Court for an injunction. Review of such order by Circuit Court of Appeals:

"It was not for the United States Circuit Court to dictate to the State court as to who should or who should not be made a party to the proceedings pending before it, and therefore it was, we presume, that the Federal court did not grant a writ to the effect asked by the applicant. . . . It is just as much the duty and the right and within the power of the State courts to secure to litigants therein the full benefit of the judgments therein pronounced as it is in like circumstances the duty of the Federal court to extend protection to litigants within its jurisdiction. . . . What steps should be taken and what process should be issued in connection with the proceedings before it is primarily for that court to determine, and we fail to find in the record before us any ground upon which to base the right to issue the writ of injunction which was in fact granted by the court below. . . . The Federal court is not, therefore, possessed of any control or jurisdiction over the realty described in the mortgage which authorizes it to enjoin the litigants in the State court from applying to that court for such relief as that court may deem is equitable and necessary. . . . It follows that the order appealed from, granting the writ of injunction in question, must be and is reversed."

This eminently respectable array of authorities, unbroken by a single conflicting decision, is challenged by adversary counsel as being "cases not in point, the State Court having had jurisdiction in every instance where injunction was refused." The indictment can not be sustained unless counsel employed the term "jurisdiction" synonymously with "possession," as Judge Wellborn, In re Hall, suggests has frequently been done.

In the case at bar, however, we find jurisdiction in the State Court secured both by service of process on the defendant Association, and by seizure of the property in dispute.

This court will understand that the Jefferson Circuit Court had through its receiver taken possession of all assets

of the Association in Kentucky. These assets consisted for the most part of policy contracts upon which the Association was deriving a profit. The receiver had notified policyholders of his appointment, and the fact that he was in possession of the Association's business, and required of them payment to him of whatever income might accrue from the property seized. All of this had taken place before proceedings were commenced in the U. S. Circuit Court. The appellant, in its bill of complaint filed herein, alleges that the State Court had taken its property, but without due process. Having taken the property, it would seem that the State Court must surely have obtained jurisdiction of the *res*.

The Circuit Court of Appeals sustained this contention of appellees in the following language:

"The effect of the appointment of the appellant as receiver, under the terms of the order, already cited, was to place him constructively in possession of the property of the appellee Association within the State of Kentucky. To obtain actual possession he had, when enjoined, notified the Association debtors to pay their debts to him, and had thus done all that was possible, without instituting suit, to reduce these choses in action to his actual possession. Is it possible that under such circumstances the receiver may be ousted from its constructive possession, and the hand of the State Court stayed, while the United States Court determines the question as to whether under the law of Kentucky the State Court had the jurisdiction to make the order and take the step complained of? No case has been cited which gives support to this contention. It is not relevant to say that a void judgment is a nullity, and that whenever it is set up as a justification its voidness may be shown. Nor is it relevant to say that the jurisdiction of the court is always a subject of inquiry when a foreign judgment is sued upon."

Counsel for appellant rely upon a line of cases where, after removal of the case from the State Court, the Federal Court issued an order of injunction, and again where in

an independent action to avoid a judgment on the ground of fraud, the State court was enjoined from executing the judgment nullified by the Federal Court. Judge Lurton denied the applicability of such authorities:

"It is plain that in all these cases the Federal Court was violating no rule of comity, for in every one of the supposed exceptions to the statute the court was either protecting its own prior possession of the *res*, or of the controversy, or enforcing its own judgment. This is true of a suit for the nullification of a judgment upon the ground of fraud. The relief sought in such a case would be the subject of an independent suit in equity, and, if the requisite diversity of citizenship existed, such a suit could be maintained in a circuit court of the United States, and any injunction against the enforcement of the judgment nullified for fraud would be mere process for the enforcement of its own judgment, and operative only through its jurisdiction over the parties thereto. In passing, however, it may be observed that in none of the cases of this class reported was an injunction actually granted in the Federal Court. In Marshall v. Holmes an injunction was allowed in the State Court before removal. This remained in force, for the cause stands after removal just the same as it did before. Bondurant v. Watson, 103 U. S. 281, 287, 26 L. Ed. 447. None of these instances of so-called exceptions made by judicial construction of the statute apply to the case in hand."

The cases cited by counsel before the Circuit Court of Appeals and in this court are to be distinguished from the instant submission by a casual reading. The case of Terre Haute, etc., R. Co. v. Peoria, etc., R. Co., 82 Fed. Rep. 943, has been referred to on several occasions by the Federal courts, but always in support of the proposition that

"A court of the United States is not prevented from enforcing its own judgment by the statute which forbids it to grant an injunction to stay proceedings in a State court." Fidelity, etc., Co. v. Norfolk, etc., Co., 88 Federal Rep. 821, and Staar v. Chicago, etc., Co., 110 Fed. Rep. 7; Riverdale Mills v. Alabama, etc., Co., 111 Fed. Rep. 432.

Here the Circuit Court had no previous connection with either party or property until the bill of complaint was filed. And it is to be noted that the bill of complaint does not seek any other relief than an order of injunction. The Federal Court is not asked by the bill to nullify any judgment or hold void any action of the State Court. The bill prays only an injunction to restrain parties and officers of the State Court from continuing to proceed in the State Court. (Record p. 7.)

If the following statement, from the argument of appellant, sets forth the entire law: "Where the State Court is acting within the limits of its jurisdiction, or its officers are enforcing its valid orders or decrees, it is recognized that no Federal Court should impede or avert any action so taken," if this be the limit of all prohibition upon Federal Courts, what becomes of Section 720 of the Revised Statutes? No court of the United States, no self-respecting court anywhere, would attempt to impede or avert action taken by another court within the limit of its jurisdiction, or when its officers are enforcing its valid orders or decrees. It is only where courts of the United States consider that State courts are acting without jurisdiction, or its officers are enforcing invalid orders, that they would be moved to enjoin proceedings in such State Court. To meet just such a case Section 720 was passed, and in such manner must it be construed.

Appellees close this phase of their case with the very appropriate language of Judge Speer:

"These citations of elevated and paramount authority are perhaps more copious than is requisite, but since nothing would so seriously prejudice the character and usefulness of the courts of the United States or of the State as those unseemly conflicts of authority which not only excite communities, but which, both in this country and in England,

have afforded occasions for intemperateness in the assertion of jurisdiction on the one hand, and for its denial in the other, hardly comporting with the serene and impartial reserve of the bench, the settled rule upon the subject whenever its announcement is appropriate can not be too strongly emphasized or too amply supported by those impregnable statements of principle which stand out in the decisions of the Supreme Court of the United States, statements which bear in lucid phrase the precise expression of sovereign and beneficent laws. Moreover the apparent conflicts of authority between the courts of the State and of the United States furnish no proper occasion for nice or narrow divisions of the subject of litigation—none for divisions of jurisdiction. In a case like that before the court, the court first taking jurisdiction of the substance of the litigation should dispose of all the incidents." Teft v. Sternberg, 40 Fed. Rep. 6.

The Proper Procedure.

Senior v. Pierce, 31 Fed. Rep., and Rensselaer v. Bennington R. Co., 18 Fed. Rep., cited *supra*, and Judge Lurton's opinion in this record, suggest the proper method of bringing to the attention of a court of the United States the decision of a State Court involving either the merits of a controversy or a question of jurisdiction. The usual practice requires an appeal to the highest court of the State, and from thence, by writ of error, to the Supreme Court of the United States.

In C. & O. R. R. Co. v. White, 111 U. S. 137, Mr. Justice White, in refusing an application for an injunction to restrain a State Court from acting in a matter claimed to be without its jurisdiction, gives this announcement of the law:

"The Circuit Court (of the State), when it in June, 1882, declined to order a trial, did not abandon its jurisdiction. It still retained the suit, so far as any action of its own was concerned. If a sufficient cause for removal was made in the Circuit Court, the rightful jurisdiction of that court is

gone, and it can not properly proceed further; but if it does proceed and does force the defendant, who applied for the removal, to a trial, the remedy is by writ of error after final judgment, and not by prohibition of punishment for contempt. The proper practice in such cases was fully considered in Insurance Co. v. Dunn, 19 Wall. 214; Removal cases, 100 U. S. 457; R. R. Co. v. Miss., 102 U. S. 135; R. R. Co. v. Koontz, 104 U. S. 14."

So also Peck v. Jennes, 7 Howard, *supra*.

Says Judge Lurton in the instant case:

"It will not do to say that the owner of property taken constructively or actually, or about to be taken, by invalid order or process of a court of another jurisdiction, is otherwise without remedy. Such an owner may apply for relief to the court under whose authority his property has been seized. Freeman v. Howe, 24 How. 450, 16 L. Ed. 749; Covell v. Heyman, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. Ed. 390; Association v. Hurst, 7 C. C. A. 598, 59 Fed. 1, 16 U. S. App. 325; Gumbel v. Pitkin, 124 U. S. 1231, 8 Sup. Ct. 379, 31 L. Ed. 374; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; Lammon v. Feusier, 111 U. S. 17, 4 Sup. Ct. 286, 28 L. Ed. 337. If the officer taking the property exceeds the authority of his writ, he may be sued in any court having jurisdiction in an action of trespass. Buck v. Colbath, 3 Wall. 334, 18 L. Ed. 257. A third remedy consists in the right to sue for the recovery of the property after the hand of the court seizing it has been raised. If the taking was under a proceeding void for want of due process of law, the title of one acquiring it under such an invalid proceeding would be unavailing. Cooper v. Newell, 173 U. S. 555, 19 Sup. Ct. 506, 43 L. Ed. 808."

Counsel for the Association argue that the procedure suggested did not afford their client adequate relief, because as they contend, an appeal to the Court of Appeals of Kentucky, would, under the authorities of the State Court, have been an entry of appearance. We submit that had the appellant Association taken an appeal to the court of last resort of the State for the purpose of testing the jurisdiction

of the State Court, and had such appellate court construed the appeal as itself an entry of appearance, then this court upon writ of error would review the entire case, and if proper would reverse the rulings of the State Circuit Court and the Court of Appeals.

The appellant in its assignments of error filed on this appeal sets forth that the intervention of the Federal court was the "only adequate and effectual remedy of enforcing the prohibition of the Fourteenth Amendment of the Constitution of the United States, and the only adequate and effectual remedy to prevent the State court's taking appellant's property without due process of law." This is not true.

In addition to the remedies suggested by Judge Lurton and those heretofore proposed in this brief, all open to appellant and each adequate for its fullest protection, we desire to call the court's attention to another procedure whose effectiveness the appellant can not dispute.

A writ of prohibition might have been secured from the Kentucky Court of Appeals, if the Jefferson Circuit Court was proceeding without jurisdiction or due process of law.

Regarding the use and scope of such writ of prohibition, the following quotation from the opinion of Chief Justice Hazelrigg, in Weaver v. Toney, Judge, 107 Ky. 419, should be read.

"In Preston v. Fidelity Trust and Safety Vault Company, 94 Ky. 295, (22 S. W. 318); Goldsmith v. Owen, 95 Ky. 420 (26 S. W. 8), and Louisville Savings L. & B. Association v. Harbeson, Judge, &c., 21 Ky. L. R. 278 (51 S. W. 787), the power of this court to issue writs of prohibition seems to have been assumed, rather than in terms asserted; the writs sought being denied because it did not appear that the inferior courts were proceeding out of their jurisdiction.

All these cases present very persuasive evidence in support of the jurisdiction.

"And in Hindman v. Toney, 97 Ky. 413 (30 S. W. 1006), this court expressly settled the question, and, on the petition of Hindman, granted a writ prohibiting one of the Circuit Judges of Jefferson County from passing on the case, which properly had been assigned to another division of that court. And the writ was awarded, it may be said here, although by express statute (Kentucky Statutes, Section 1028) no proceedings in a case were to be invalid because prosecuted in the wrong branch of the Jefferson Circuit Court. It was hardly a question of jurisdiction in the lower court, therefore, but rather a question of preventing confusion and conflict in the conduct of business in the four branches of that court. It was held in that case that this court having a discretion, ought not generally to issue writs of prohibition, when adequate relief can be afforded complainants by resort to the 'revisory power,' meaning the appellate jurisdiction of this court.

"In view of these cases, it must be regarded as settled law that in proper cases, where the inferior tribunal is proceeding out of its jurisdiction, the power of this court may be invoked to stay the exercise of such jurisdiction; and it would also seem, in certain classes of cases, that even where the inferior tribunal has jurisdiction this court may likewise interfere, if the remedy by appeal is not entirely adequate, or if the court, in the exercise of its discretionary powers, shall deem it necessary to so interfere."

The appellant Association seemed determined to avoid the courts of Kentucky, no matter how numerous or sufficient were the remedies which Kentucky practice sanctions, and which safeguards the rights of the litigant. Had the Association asked any court of the Commonwealth for relief, and its application had been denied, its position here might be viewed with some patience. But when a party has never stated its grounds of complaint to the State court, or in any way afforded the State court opportunity to correct its alleged errors, Federal courts ought not and will not nterfere by injunction to revise or reverse.

The Amount in Controversy.

The petition filed in the State court sought a recovery "in the sum of $1,994.20, with interest on the various amounts going to make up said sum from the dates of payment." (Record, p. 16.) The judgment follows the prayer of the petition and adjudges "that the plaintiff recover of the defendant the sum of $1,994, with interest, etc." (Record, p. 21.) This is the only amount that has ever been involved in the case as prosecuted in the State court, or as it is presented to the United States Circuit Court. It is only by computing interest that an amount sufficient to give the lower court jurisdiction is reached, and interest is excluded in the determination of the sum involved.

The appellant works out the jurisdictional amount by representing, through allegation and affidavit, that the loss which threatened the Association on account of disorganized business exceeded $2,000, exclusive of interest. This, we believe, is an erroneous method of calculation. The only amount in controversy was $1,994.20, with interest, which amount the defendant Association might have paid under protest to the receiver, and so ended the receiver's connection with the business of the Association.

In conclusion we would again suggest that there is something more important involved here than the collection of a judgment debt. The district judge has in this case assumed a power never considered or conceived by the framers of the Federal Constitution. When the convention had under discussion the provisions of the Constitution relative to the judicial power and jurisdiction of courts of the United States,

George Mason, voicing the sentiments of no insignificant minority, thus arraigned a delegation of authority that has since come to be regarded as proper:

"To what disgraceful and dangerous length does the principle of this go? If your State judiciaries are not to be trusted with the administration of common justice and decision of dispute respecting property between man and man, much less ought the State government to be trusted with the power of legislation."

Had it occurred to Mason that the future would see not only the Supreme Court entertaining appeals from the various Federal courts and the courts of last resort of States in matters specified in the constitution, but the United States Circuit Courts acting as courts of review and revision of the judgments and decrees of subordinate State courts on every question involving process, procedure, or jurisdiction—intensity of feeling would have caused him to be either profoundly silent or profane.

Respectfully,

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Appendix.

Section 631 of the Kentucky Statutes.

"Before authority is granted to any foreign insurance company to do business in this State, it must file with the Commissioner a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State, or upon the Commissioner of Insurance of this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the Commissioner, it shall be his duty to at once send it by mail, addressed to the company at its principal office."

Section 439 of the Kentucky Civil Code of Practice.

"After an execution of *fieri facias*, directed to the county in which the judgment was rendered, or to the county of the defendant's residence, is returned by the proper officer, either as to the whole or part thereof, in substance, no property found to satisfy the same, the plaintiff in the execution may institute an equitable action for the discovery of any money, chose in action, equitable or legal interest, and all other property to which the defendant is entitled, and for subjecting the same to the satisfaction of the judgment; and in such actions, persons indebted to the defendant, or holding money or property in which he has an interest, or holding evidences or securities for the same, may be also made defendants."